IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL
CIRCUIT, DU PAGE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.
	)	
	)	
	)	
Defendant.	)	

MOTION TO DECLARE 720 ILCS 5/19-1(a) UNCONSTITUTIONAL AS APPLIED TO DEFENDANT FOR VIOLATION OF DUE PROCESS BY VAGUENESS AND THE PROPORTIONAL PENALITIES CLAUSE OF THE ILLINOIS CONSTITUTION AND THE EIGHT AMENDMENT OF THE UNITED STATES CONSTITUTION

Now comes the Defendant, _____, by his attorney, Assistant Public Defender ----------, and moves this Honorable Court to declare 720 ILCS 5/19-1(a) unconstitutional as applied to Defendant and dismiss the burglary count pending against Defendant in the above captioned matter as being in violation of the Due Process Clause of the United States and Illinois Constitutions due to vagueness and the Proportional Penalties Clause of the Illinois Constitution. In support thereof, Defendant states as follows:

INTRODUCTION

1. The starting point in reviewing the constitutionality of statutes is that the statutes are presumed constitutional and all reasonable doubts must be resolved in favor of upholding their validity. The court must construe acts of the legislature so as to affirm their constitutionality and validity if it can reasonably be done. *People v. Steffens,* 208 Ill.App.3d 252 (1991). It is the party challenging the constitutionality of a statute that bears the burden of clearly establishing the constitutional violation. *People v. Bales,* 108 Ill.2d 182 (1985).

2. The due process clauses of the United States and Illinois Constitutions provide that no person shall be deprived of "life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, Ill. Const., Art. I, § 2.

3. Procedural due process claims concern the constitutionality of the specific procedures employed to deny a person's life, liberty, or property interest. *People v. R.G.,* 131 Ill.2d 328 (1989); *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985). Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. *People v. Lang,* 113 Ill.2d 407 (1986); *Fuentes v. Shevin,* 407 U.S. 67 (1972). Courts considering procedural due process questions

conduct a three-part analysis: the first asks the threshold question whether there exists a liberty or property interest which has been interfered with by the State; the second examines the risk of an erroneous deprivation of such an interest through the procedures already in place, while considering the value of additional safeguards; and the third addresses the effect the administrative and monetary burdens would have on the state's interest. *Mathews v. Eldridge*, 424 U.S. 319 (1976)

4. If a statute is challenged constitutionally and implicates a *fundamental right* or discriminates based on a suspect classification of race or national origin, the court subjects the statute to "strict scrutiny" analysis and will uphold the statute only if it is narrowly tailored to serve a compelling State interest. If the statute does not affect a fundamental constitutional right or involve a suspect classification, the rational basis test applies, requiring the statute bear a rational relationship to the purpose the legislature intended to achieve by enacting it. *People v. Shephard*, 152 Ill.2d 489, (1992); *People v. Cornelius*, 213 Ill.2d 178 (2004)

5. In an "as-applied" challenge, the party challenging the statute contends that the application of the statute in the particular context in which the challenger has acted, or in which he proposes to act, would be unconstitutional. An "as-applied" challenge requires a party to show that the statute violates the constitution as the statute applies to him. *People v. Garvin*, 219 Ill.2d 104 (2006). If a statute is unconstitutional as applied, the State may continue to enforce the statute in circumstances where it is not unconstitutional. *People v. Brady*, 369 Ill. App. 3d 836 (2nd Dist. 2007)

STATEMENT OF FACTS

6. Defendant is charged with a two count indictment, to wit:

…**Retail Theft** in that said defendant knowingly took possession of certain merchandise offered for sale in a retail mercantile establishment, Burlington Coat Factory…with the intention of depriving the merchant, Burlington Coat Factory, permanently of the use or benefit of such merchandise, without paying the full retail value of such merchandise said defendant having previously been convicted of Retail Theft, in violation of 720 ILCS 5/16-25(a)(1) and 720 ILCS 5/16(f)(2) (see attached Exhibit A)

…**Burglary** in that said defendant knowingly and without authority entered the building of Burlington Coat Factory…with the intent to commit a theft in violation of 720 ILCS 5/19-1(a) (see attached Exhibit B)

7. 720 ILCS 5/16-25(a)(1) **Retail Theft** holds:

(a) A person commits retail theft when he or she knowingly:

(1) Takes possession of, carries away, transfers or causes to be carried away or transferred any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of

the possession, use or benefit of such merchandise without paying the full retail value of such merchandise…

8. 720 ILCS 5/19-1 **Burglary** holds:

(a) A person commits burglary when without authority he or she knowingly enters or without authority remains within a building, housetrailer, watercraft, aircraft, motor vehicle, railroad car, or any part thereof, with intent to commit therein a felony or theft. This offense shall not include the offenses set out in Section 4-102 of the Illinois Vehicle Code.

9. In the store at issue, notice is posted that "shoplifters will be prosecuted". (See Defendant's Exhibit C attached hereto)

10. Because of prior convictions, the charged offense becomes a Class 4 felony with a potential extended term sentence of 1 – 6 years in the Illinois Department of Corrections. Defendant is then charged with Burglary and under Defendant's prior history, he is subjected to Class X sentencing. By being charged with burglary, Defendant is mandatorily required to serve a sentence of 6 to 30 years in the Illinois Department of Corrections if he pleads or is found guilty.

11. Defendant contends that the burglary statute as applied to him violates his due process rights as being unconstitutionally vague in its application to him and in violation of proportional penalties and cruel and unusual punishment as applied to him.

VAGUENESS

12. Legislation may run afoul of the due process clause if it fails to give adequate guidance to those who would be law–abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused. *Musser v. Utah*, 333 U.S. 95 (1948).

13. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law *impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications* (emphasis added). *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489 (1982).

14. Acts which are made criminal must be defined with appropriate definiteness. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The

vagueness may be from uncertainty in regard to persons within the scope of the act or in regard to the applicable tests to ascertain guilt. *Winters v. New York*, 333 U.S. 507 (1948)

15. Statutes which lack the requisite definiteness or specificity are commonly held void for vagueness. Such a statute may be pronounced wholly unconstitutional (unconstitutional "on its face") *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) or, if the statute could be applied to both prohibitable and to protected conduct and its valuable effects outweigh its potential general harm, it could be held unconstitutional as applied. *Palmer v. City of Euclid*, 402 U.S. 544 (1971).

16. *People v. Bales*, 108 Ill. 2d 182 (1985) holds there are two requirements under the due process-vagueness standard when the first amendment is not involved. First, the statute must give a person of ordinary intelligence a reasonable opportunity to know what conduct is lawful and what conduct is unlawful. Thus, the statute must give fair warning as to what conduct is prohibited. Second, the statute must provide standards, so as to *avoid arbitrary and discriminatory enforcement and application by police officers, judges, and juries* (emphasis added). *Grayned v. City of Rockford*, 408 U.S. 104 (1972)

17. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 498 (1982).

18. On information and belief, DuPage County selectively enhances Retail Theft charges with a count of Burglary if the defendant in question has a "significant" criminal record.

19. In the instant case, Defendant is accused of committing a retail theft by entering a Burlington Coat Factory in Villa Park and removing a misdemeanor amount of clothing from the store without paying for said items, a classic instance of retail theft. Because of prior convictions, the charged offense becomes a Class 4 felony with a potential extended term sentence of 1 – 6 years in the Illinois Department of Corrections.

20. Under Defendant's prior history, he is subjected to Class X sentencing. By being charged with burglary, Defendant is mandatorily required to serve a sentence of 6 to 30 years in the Illinois Department of Corrections if he pleads or is found guilty.

21. Charging Defendant with burglary for what is classically a retail theft is an arbitrary and discriminatory enforcement and application of the burglary statute.

22. *People v. Steppan*, 105 Ill. 2d 310 (1985) in construing the legislative intent of the Illinois burglary and theft statutes held:

> The function of the courts in construing statutes is to ascertain and give effect to the intent of the legislature. (People v. Rink (1983), 97 Ill.2d 533, 539, 74 Ill.Dec. 34, 455 N.E.2d 64; People v. Robinson (1982), 89 Ill.2d 469, 475, 60 Ill.Dec. 632, 433 N.E.2d 674.) In ascertaining the intent of the legislature, it is proper for the court not only to

> consider the language employed by the statute, but also to look to the " 'reason and necessity for the law, the evils to be remedied, and the objects and purposes to be obtained.' " (People v. Alejos (1983), 97 Ill.2d 502, 511, 74 Ill.Dec. 18, 455 N.E.2d 48; see also People v. Bratcher (1976), 63 Ill.2d 534, 543, 349 N.E.2d 31.) Moreover, in construing statutes, the courts presume that the General Assembly, in passing legislation, did not intend absurdity, inconvenience or injustice. Illinois Crime Investigating Com. v. Buccieri (1967), 36 Ill.2d 556, 561, 224 N.E.2d 236.

23. *Steppan* went on to hold the purpose of the burglary statute is to protect the security and integrity of certain enclosures. On the other hand, the theft statute was enacted to cover an entire range of offenses against property. Thus, the Supreme Court presumed that the General Assembly considered different factors in enacting a penalty provision for theft than for burglary.

24. In reviewing the State practice of charging a burglary on top of a retail theft, *People v. McDaniel*, 2012 IL App 100575 (5th Dist.) held:

> The State knows that [defendant] was truly 'stealing', rather than committing a burglary. The defense acknowledged at trial that shoplifting was what [defendant] was doing. * * * In reality, the approach taken by the State in this prosecution, and in this appeal, will serve to convert every retail theft into a burglary. Ordinary burglary is a Class 2 felony punishable by three to seven years in prison. 720 ILCS 5/19–1 (West 2012)[sic]; 730 ILCS 5/5–4.5–35(a) (West 2012) [sic]. Standard retail theft of the type occurring in this case (theft not from the person, under $500) is a Class A misdemeanor punishable by up to 364 days in jail. 720 ILCS 5/16–1(b)(1) (West 2012)[sic]; 730 ILCS 5/5–4.5–55(a) (West 2012)[sic]. The difference in potential penalties is severe. Whether or not it is good public policy to convert potentially all retail theft prosecutions into more serious ones for burglary is a matter of speculation. Whether good or bad though, *that decision does not rest with the police, prosecutors, or even the courts of this state*. (emphasis added) The legislature defines what actions constitute a crime and how the crime should be punished. People v. Lee, 167 Ill.2d 140, 145 (1995). If the police and prosecutors of Illinois believe that harsher penalties should be available to punish retail theft, they should put the issue before the legislature and seek change in the laws through legislative amendment. This [c]ourt should not assist the prosecution in creating a de facto amendment to the criminal law by reading 'remaining within' so broadly that common shoplifting becomes burglary."*
>
> *It must be noted that *People v. Bradford*, 2014 IL App (4th) 130288 held contrary, that there is no infirmity in charging a burglary on top of a retail theft. It should be further noted that the Illinois Supreme Court allowed PLA from the appellate court in *Bradford* on March 25, 2015.

25. In charging Defendant with burglary, the State has clearly, under the circumstances of this case, engaged in arbitrary and discriminatory enforcement and application of the burglary statute. In presenting its case to the grand jury, the State engaged in the attached colloquy with its arresting officer. (see grand jury transcript attached here to as Exhibit D) As a result, the Grand Jury found a true bill against Defendant for "knowingly and without authority entered the

building of Burlington Coat Factory…with the intent to commit a theft". Nowhere in the testimony was anything presented to indicate Defendant *knowingly and without authority* entered Burlington Coat Factory *with intent to commit a theft.* The grand jury was presented with the scenario of a retail theft and by the vagueness of the burglary statute in its application in this context was goaded into indicting on a burglary.

26. In *People v. Miller*, 238 Ill.2d 161 (2010), the Illinois Supreme Court determined that Retail Theft is not a lessor included offense of Burglary by using the "abstract elements" approach. In its analysis, the Court spoke of how to make a determination if two offenses are similar, or in this case, one is a lessor included of the other:

> In the absence of statutory direction, we have identified three possible methods for determining whether a certain offense is a lesser-included offense of another: (1) the "abstract elements" approach; (2) the "charging instrument" approach; and (3) the "factual" or "evidence" adduced at trial approach. Novak, 163 Ill.2d at 106, 205 Ill.Dec. 471, 643 N.E.2d 762.
>
> Under the abstract elements approach, a comparison is made of the statutory elements of the two offenses. If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second. Novak, 163 Ill.2d at 106, 205 Ill.Dec. 471, 643 N.E.2d 762; Kolton, 219 Ill.2d at 360, 302 Ill.Dec. 386, 848 N.E.2d 950. Although this approach is the most clearly stated and the easiest to apply (J. Ettinger, In Search of a Reasoned Approach to the Lesser Included Offense, 50 Brook. L. Rev. 191, 198 (Winter 1984)), it is the strictest approach in the sense that it is formulaic and rigid, and considers "solely theoretical or practical impossibility." In other words, it must be impossible to commit the greater offense without necessarily committing the lesser offense. Novak, 163 Ill.2d at 106, 205 Ill.Dec. 471, 643 N.E.2d 762; Kolton, 219 Ill.2d at 360, 302 Ill.Dec. 386, 848 N.E.2d 950.
>
> Under the charging instrument approach, the court looks to the charging instrument to see whether the description of the greater offense contains a "broad foundation" or "main outline" of the lesser offense. Kolton, 219 Ill.2d at 361, 302 Ill.Dec. 386, 848 N.E.2d 950. The indictment need not explicitly *167 state all of the elements of the lesser offense as long as any missing element can be reasonably inferred from the indictment allegations. This is the intermediate approach. Kolton, 219 Ill.2d at 361, 302 Ill.Dec. 386, 848 N.E.2d 950.
>
> Lastly, under the evidence or facts approach, the court looks to the facts adduced at trial to determine whether proof of the greater offense necessarily established the lesser offense. This is the broadest and most lenient approach of the three. Kolton, 219 Ill.2d at 360–61, 302 Ill.Dec. 386, 848 N.E.2d 950

Thus, under the "evidence or facts" approach, the State has accomplished the charging of two distinct offenses by the vagueness of an offer of identical facts to the charging body.

27. In a review of all defendant's charged with Retail Theft only and those charged with Retail Theft and Burglary, the years 1981 through 2007 show that approximately 0% – 3% of defendants charged with Retail Thief were charged with Burglary. From 2008 through 2015 to date (6/15) show that approximately 10% to 30% of defendants charged with Retail Theft were charged with burglary. There were no corresponding changes to the Retail Theft Statute or Burglary statute during a 20 year period surrounding this shift in charging. (See Exhibit E – the raw number of cases – specific case numbers are available).

28. By its actions, the State has engaged in arbitrary and discriminatory enforcement and application of the burglary statute in its decision to charge Defendant with burglary and its presentation of a constitutionally vague charge to the Grand Jury in the circumstances of this case.

PROPORTIONAL PENALITIES/CRUEL AND UNUSUAL PUNISHMENT

29. Article I, Section 11, of the Illinois Constitution states;

> Limitation of Penalties after Conviction
>
> All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.

Also known as the Proportional Penalities Clause, it provides that all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. A proportionality challenge contends that the penalty in question was not determined according to the seriousness of the offense. A defendant may challenge a penalty on the basis that it is harsher than the penalty for a different offense that contains identical elements or that a particular offense violates the cruel or degrading standard. *People v. McCarty*, 223 Ill. 2d 109 (2006)

30. Under the State's police power, the legislature has wide discretion to prescribe penalties for defined offenses. However, the legislature's exercise of the police power is constitutional only where the statute in question bears a reasonable relationship to the public interest to be protected, and the means adopted must be a reasonable method of accomplishing the desired objective. *People v. Wick*, 107 Ill.2d 62 (1985). Otherwise stated, "the classification of a crime and the penalty provided [must] be reasonably designed to remedy the evils which the legislature has determined to be a threat to public health, safety and general welfare." *People v. Toliver* 251 Ill.App.3d 1092 (2d Dist. 1993), *People v. Bowen*, 241 Ill.App.3d 608 (4th Dist. 1993). The determination of reasonableness is a matter for the courts. *People v. Morris,* 136 Ill.2d 157 (1990), and the due process test "focuses on the purposes and objectives of the enactment in question" *People v. Johns,* 153 Ill.2d 436 (1992).

31. As previously indicated, *People v. Steppan*, 105 Ill. 2d 310 (1985) held the purpose of the burglary statute is to protect the security and integrity of certain enclosures. On the other hand, the theft statute was enacted to cover an entire range of offenses against property. Thus,

the Supreme Court presumed that the General Assembly considered different factors in enacting a penalty provision for theft than for burglary.

32. As is illustrated by the Grand Jury transcript in this case, the burglary as indicted has the same elements as the retail theft. In fact, there is nothing to distinguish the premise of the retail theft from the premise of the burglary as applied to Defendant.

33. Because a greater penalty can be imposed for burglary than theft under the circumstances of this case, section 19–1(a) is constitutionally infirm. Article I, section 2, of the Illinois Constitution provides: "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." Ill. Const. 1970, art. I, sec. 2. The due process guarantee of section 2 requires that penalty provisions be reasonably designed to remedy the particular evil which the legislature has selected for treatment under the statute in question.

34. The Eighth Amendment to the United States Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society.' *Estelle v. Gamble*, 429 U.S. 97 (1976) The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.

35. The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances. Under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes. The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense. *Weems v. United States*, 217 U.S. 349 (1910).

36. The Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty. In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive. Under this approach, the Court has held unconstitutional a life without parole sentence for the defendant's seventh nonviolent felony, the crime of passing a worthless check. *Solem v. Helm*, 463 U.S. 277 (1983).

37. *Harmelin v. Michigan*, 501 U.S. 957 (1991) explained its approach for determining whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime. A court must begin by comparing the gravity of the offense and the severity of the sentence. In the rare case in which this threshold comparison leads to an inference of gross

disproportionality the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis validates an initial judgment that thesentence is grossly disproportionate, the sentence is cruel and unusual. *Graham v. Florida*, 560 U.S. 48 (2010), as modified (July 6, 2010)

38. *Solem v. Helm*, 463 U.S. 277 (1983) presents a situation closely related to the case at bar.

> Helm's crime was "one of the most passive felonies a person could commit." *State v. Helm*, 287 N.W.2d, at 501 (Henderson, J., dissenting). It involved neither violence nor threat of violence to any person. The $100 face value of Helm's "no account" check was not trivial, but neither was it a large amount. One hundred dollars was less than half the amount South Dakota required for a felonious theft. It is easy to see why such a crime is viewed by society as among the less serious offenses. See Rossi et al., 39 Am.Soc.Rev., at 229.
>
> Helm, of course, was not charged simply with uttering a "no account" check, but also with being an habitual offender. And a State is justified in punishing a recidivist more severely than it punishes a first offender. Helm's status, however, cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor. All were nonviolent and none was a crime against a person. Indeed, there was no minimum amount in either the burglary or the false pretenses statutes, see nn. 1 and 2, *supra,* and the minimum amount covered by the grand larceny statute was fairly small, see n. 3, *supra.*
>
> Helm's present sentence is life imprisonment without possibility of parole. Barring executive clemency, see *infra,* at 3015-3016, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in *Rummel v. Estelle.* Rummel was likely to have been eligible for parole within 12 years of his initial confinement, a fact on which the Court relied heavily. See 445 U.S., at 280-281, 100 S.Ct., at 1142-1143. Helm's sentence is the most severe punishment that the State could have imposed on any criminal for any crime. See n. 6, *supra.* Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

39. Defendant is in a similar position to Victor Hugo's Jean Valjean. In this case, for what the legislature determined to be a misdemeanor theft, Defendant is facing Class X sentencing. Thus, under the facts of this case, where the *statutory* enhancement of misdemeanor retail theft to a felony expands what would normally be a maximum sentence of 364 days to a "double enhanced" maximum of six years with probation still a possibility, the *State's* enhancement of a misdemeanor retail theft to a burglary in these circumstances expands Defendant's sentence to a minimum of 6 years to a maximum of 30 years with no possibility of parole. Surely, the Illinois Legislature did not intend such discretionary enhancement which is clearly disproportional to the offense.

CONCLUSION

WHEREFORE, Defendant moves this Honorable Court to declare 720 ILCS 5/19-1(a) unconstitutional as applied to Defendant and dismiss the burglary count pending against Defendant in the above captioned matter as being in violation of the Due Process Clause of the United States and Illinois Constitutions due to vagueness and the Eight Amendment to the United States Constitution and the Proportional Penalties Clause of the Illinois Constitution.

Respectfully submitted,

_____